State of New Hampshire

Board of Tax and Land Appeals

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State Office Park
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Concord, New Hampshire
03301-3834

In Re: City of Berlin

Docket No.: 29285-19OS

ORDER

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I. Issues Presented

The board held a noticed evidentiary hearing lasting two days[1] on the issues presented in this docket. (See the November 18, 2020 and October 29, 2019 Orders and Hearing Notices; and the September 16, 2020 Order.)

The following attorneys represented the parties at this hearing: Charles P. Bauer, Esq. and Matthew V. Burrows, Esq., of Gallagher, Callahan & Gartrell for the Board of Assessors

[1] The hearing was held remotely using Cisco's WebEx technology on January 12 and February 4, 2021 by the three board members (Michele E. LeBrun, Albert F. Shamash and Theresa M. Walker). The hearing dates were delayed several times due to the current pandemic and a health issue involving one of the participants.

("BOA") of the "City"; Christopher L. Boldt, Esq. of Donahue, Tucker & Ciandella, PLLC for the City; and Peter Roth, Esq. and Derek Kline, Esq. for the department of revenue administration ("DRA").

Testifying at the hearing were: James Gerry, Director, and Philip Bodwell, District Supervisor, for the DRA; Mark Eastman, Kem Rozek and Robert Goddard, the three members of the BOA; Jim Wheeler, City Manager; and Stephen Dion, a taxpayer in the City. In addition, two assessors doing work for the City provided testimony: Monica Hurley of Corcoran Consulting Associates, Inc. and Rob Tozier, Vice President of KRT Appraisal. (See Table 1 for a full list of the attendees on each day of the hearing.)

The hearing revealed sharp and continuing disagreements resulting from certain abatements granted by the BOA members (detailed below) after the City completed a statistical update of property values in tax year 2018. The overriding question in this docket is: should the board order certain remedies or, alternatively, should the board close the docket at this time without further action.[2] The board has the authority to review abatements illegally and/or improperly granted by local assessing officials and to take remedial action in such instances. [See, e.g., Appeal of Wood Flour, Inc., 121 N.H. 991, 994 (1981), discussed further below.]

The DRA contends remedies should be imposed because of evidence presented at the hearing that certain abatements for tax year 2018 resulted only from alleged "inequity and self-dealing" by the BOA and "a new revaluation [in tax year 2020] does nothing to correct the past

[2] In the September 16, 2020 Order, the board directed the parties to address "the issue of whether the revaluation in 2020 obviates the need for further proceedings" in light of the record presented in this docket.
In its November 18, 2020 Order and Hearing Notice (see p. 2), the board scheduled the evidentiary hearing to receive "additional evidence . . . regarding [certain] allegedly 'illegal and improper' abatements, as well as other issues inherent in this proceeding."

effects of that inequity." (See DRA's October 16, 2020 Memorandum of Law, pp. 6 and 8.) The DRA's "Post Hearing Memorandum" (see pp. 7-16), filed on February 16, 2021, contends: the abatements granted by the BOA for tax year 2018 on properties owned by its three members and one member's son (Thomas Rozek) were improper; the board should order a "pay back to the City for the improper reduction of taxes . . ."; and the board should consider "leaving [this] docket open for further proceedings should these problems . . . not be resolved in a timely and satisfactory way . . .".

Mr. Dion filed a "Post Hearing Memorandum" on February 11, 2021. This pleading, as well as his testimony, is consistent with the DRA's arguments that the abatements granted by the BOA members to themselves and Thomas Rozek were improper and should be set aside.

The BOA has consistently argued otherwise, claiming no remedy is warranted and stating the board should "decline jurisdiction over this matter, given the 2020 property revaluation that has taken place, and close the docket in this matter without further proceedings." (See October 16, 2020 "Response," p. 4.) The BOA's February 16, 2021 "Post-Hearing Memorandum," p. 1, further contends: neither Mr. Dion nor the DRA "satisfied their burden of proving that any member of the . . . BOA engaged in fraud, self-dealing, collusion, or bad faith"; their respective recusals "relative to abatement applications for which they had a conflict of interest" were proper in "removing any appearance of impropriety"; no "reassessment is warranted"; and the "DRA's proposed adjustments to the assessed values . . . should be rejected."[3]

[3] The City's attorney actively participated at the hearing, but chose not to file a post-hearing memorandum. Throughout these proceedings the BOA and the City were represented by separate attorneys because of perceived but unstated 'conflicts.'

II. Findings and Rulings

The board considered all of the evidence and arguments presented by the parties, including the pleadings mentioned above and the entire record.[4] The board's findings of fact and rulings of law are detailed below.

A. Findings of Fact

The three BOA members (Robert Goddard, chairman, Kem Rozek and Mark Eastman) testified they voted to have a statistical update performed for tax year 2018. They did so even though the City had performed a prior full revaluation just three years earlier (for tax year 2015).[5]

The apparent reason for this 2018 update was a shortfall in the City's budget (of about $10 million in tax revenues). The City wanted to solve this problem by increasing assessments to bring them closer to market values while still keeping the tax rate below $40 per thousand dollars of assessed value (the "mill rate").[6] (Property tax revenues result from multiplying the mill rate to the assessed value of each property.)

KRT Appraisal, an "independent contractor," was hired to perform the statistical update over the span of several weeks in the fall of 2018 at a cost of $15,000. (See BOA Response, p. 2.) In their testimony, the BOA members explained they were under prolonged pressure from

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[4] The record includes a subsequent three-page February 19, 2021 DRA letter (hereinafter, the "DRA Letter") clarifying the reasons for inclusion of an attachment to its Post Hearing Memorandum (pertaining to the 2020 revaluation by the City's contract assessor, Monica Hurley of Corcoran Consulting Associates) and the City's February 22, 2021 response to the DRA Letter (hereinafter, the "City's Response".)

[5] In most instances, municipalities are not required to reassess properties more often than once every five years. (See RSA 75:8-a.)

[6] According to information on the DRA's website, the City's mill rates were $39.19 in 2017, $39.27 in 2018 and $39.82 in 2019. This same source reports the aggregate assessed value of property in the City (excluding utilities) increased from $252.2 million to $276.3 million (rounded) between tax years 2017 and 2018. This increase likely occurred mostly, if not entirely, because of the 2018 update.

the City Manager and others to approve the update. They noted KRT Appraisal was hired very late in the tax year, which delayed completion and the issuance of tax bills, causing further cash flow problems. The record reflects the BOA members remained dissatisfied with this update, emphasized there were only four unimproved land sales in the KRT Appraisal CAMA (computer assisted mass appraisal) model and their belief it contained "flaws."

The board finds, however, these complaints voiced by the BOA members in their public deliberations and at the hearing are not supported by the record presented and do not justify or excuse their later actions with respect to abatement applications filed after the BOA accepted the tax year 2018 assessments. The record indicates the BOA members likely lacked sufficient knowledge and judgment to determine if the CAMA model was producing generally proportional assessments. The customary and standard method to determine the accuracy of an assessment model is through the use of ratio studies, analyses of various statistical metrics including the weighted mean assessment to sale ratio, coefficient of dispersion and price related differentials. In evaluating the quality of a mass appraisal, the board finds it is not proper to rely primarily, if not entirely, on the assessments of their own or several other properties, as the BOA seems to have done, to reach a conclusion the model was "flawed."

According to the BOA Response (see pp. 2-4, 6 and 8) and the testimony at the hearing:

the BOA "received 136 abatement applications" in tax year 2018 on "164 contested parcels" and "granted abatements with respect to 66" of them, resulting in "abatements of approximately $928,575";

Mr. Dion filed for an abatement application ("on behalf of the S&L Dion Trust") because his "property increased in assessed value from $107,700 to $112,500 as a result of the assessment";[7] and

[7] The BOA's attorney noted, and Mr. Dion confirmed, he did not file an appeal of the denial of his abatement application to either the board or the superior court. (Cf. RSA 76:16-a and RSA 76:17.)

> the BOA denied Dion's application because, although he "provided a 'comparative market analysis' from a real estate agent," the BOA "concluded" Mr. Dion "failed to provide [the BOA] with sufficient comparable properties to meet the burden of proving entitlement to abatement."

To the extent the BOA contends it received a "staggering number of abatement applications" (id., p. 4) and this somehow implies or proves there were flaws in the statistical update completed by KRT Appraisal, it is mistaken. The board finds this volume of abatement applications is actually relatively low, less than five percent in a City with approximately 3,800 residential parcels, especially since there was no informal hearing process. In any event, it is not uncommon for abatement applications to increase following a full revaluation or a statistical update.

After meeting several times and ultimately voting to accept the values resulting from the statistical update, the three BOA members filed abatement applications for themselves and the son of one member claiming these properties had been overassessed. These abatement applications were granted at three BOA meetings. [See the Minutes of the April 30, May 16 and May 23, 2019 BOA meetings, DRA Exhibit Nos. 9 – 11; and DRA Exhibit No. 3 ("Statement by James Gerry"), pp. 12-14.]

As the DRA points out, this conduct by the BOA members was at odds with their obligation under RSA 75:7, which required them to sign "the 2018 MS-1 form under oath, attesting that all taxable property in the City was appraised to the best of their knowledge and belief at its full value, in accordance with state appraisal standards." (See DRA Post Hearing Memorandum, pp. 2 and 1; and DRA Exhibit No. 26, p. 172.)

The DRA began investigating these issues after receiving a letter in 2019 from another taxpayer in the City (Marc Lauze) to the effect that "members of the BOA granted themselves

abatements while denying many others." (See Post-Hearing Memorandum, Exhibit A (the "Report"), p. 1. Mr. Bodwell, the DRA Appraiser Supervisor, reviewed the tax year 2018 abatements granted by the BOA on residential properties owned by the three BOA members (Kem Rozek, Mark Eastman and Robert Goddard), the son of one member (Thomas Rozek) and one other taxpayer. In his Report and testimony, Mr. Bodwell concluded the adjustments made by the BOA members on their own properties (and properties owned by Thomas Rozek and one other taxpayer) were inconsistent with the assessment tables set forth in the reassessment manual and how other properties in the City were assessed.

Mr. Bodwell's conclusions are detailed in the chart on p. 5 of the DRA's Memorandum of Law and Exhibit A (his narrative "Report"). He also testified at the hearing and was cross-examined at some length.

The chart below contains relevant information that is not in dispute and includes information contained in Mr. Bodwell's chart:[8]

Taxpayer/ Property	2017 Assessment	2018 Assessment	BOA Abated Assessment	Difference ($)	Difference (%)	Bodwell (DRA) Recommended Assessment
Robert & Debra Goddard (Map 126, Lot 70)	$16,900 (Land Only)	$91,600	$53,525	$38,075	-42%	$91,600
Kem & Michael Rozek (Map 138, Lot 28)	$180,437	$204,614	$161,114	$43,500	-21%	$216,214
Thomas Rozek (Map 139 Lot 1)	$88,000	$103,200	$77,100	$26,100	-25%	$103,200
Mark & Rachel Eastman (Map 119, Lot 219)	$113,000	$126,700	$104,600	$22,100	-17%	$126,700

[8] Not included in the board's chart is a fifth property analyzed by Mr. Bodwell owned by the Dudley A. Deane Trust (the "Deane Property," Map 122, Lot 11). The owner of the Deane Property did not receive notice and did not attend the hearing. The DRA Post Hearing Memorandum (see pp. 8-11) does not discuss the Deane Property and (unlike the other four properties in the board's table) does not request a remedy with respect to it. The board agrees with the BOA's Post-Hearing Memorandum (p. 16) that various concerns mitigate against imposing a remedy against the Deane Property at this time.

(See also the "pre" and "post" abatement tax cards and DRA "comparable" cards submitted as DRA Exhibit Nos. 14-15, pp. 77-100.)

It is significant to note, at the outset, that (with the exception of the Goddard property which was assessed for land only in tax year 2017) the BOA members granted substantial abatements that reduced their own and Thomas Rozek's assessments to levels below that of their 2017 assessments. There is no evidence the BOA members disputed their 2017 assessments and the board heard evidence property values were increasing. Nonetheless, the abated assessments for these BOA members are all below their 2017 assessments. In addition, there is little or no evidence that the BOA members relied on credible market value evidence before granting themselves these abatements. These facts raise serious questions regarding the proportionality of the resulting abated assessments.

The Goddard property (Map 126, Lot 70), with a residence only "25% complete" as of the April 1, 2018 assessment date, received an abatement of $38,075 (42% reduction in assessed value) by members Rozek and Eastman. They voted to change the neighborhood code, site index (view) and made other adjustments that cannot be justified. (See the Bodwell analysis, pp. 4-7, attached to the DRA Response.)

The Kem and Michael Rozek property (Map 138, Lot 28) received an abatement of $43,500 (21% reduction in assessed value) by members Goddard and Eastman. They voted to change the neighborhood code, site index, building grade and made other adjustments (including a power line adjustment) that cannot be justified. (See the Bodwell analysis, pp. 1-3, attached to the DRA Response.)

The Thomas Rozek property (Map 139, Lot 1) received an abatement of $26,100 (25% reduction in assessed value) by members Goddard and Eastman. Without performing an interior

inspection, they voted to change the "style' of the residence and its condition, applied functional and external obsolescence and made other adjustments (including a power line adjustment) that cannot be justified. (See the Bodwell analysis, pp. 1-3, attached to the DRA Response.)

The Eastman property (Map 19, Lot 219) received an abatement of $22,100 (17% reduction in assessed value) by members Goddard and Rozek. Without performing an interior inspection, they voted to change the condition of the residence and made other adjustments (including a power line adjustment) that cannot be justified. (See the Bodwell analysis, pp. 1-3, attached to the DRA Response.)

As shown in the above chart, Mr. Bodwell reached the same conclusions as the City's contract assessor, KRT Appraisal, regarding the proportionality of the tax year 2018 assessments on the two Rozek, the Eastman and the Goddard properties to the effect that no abatements were warranted. Instead of denying the abatement applications, however, the BOA granted very substantial abatements to each of the above properties (ranging from 17% to 42%), resulting in disproportionality.

The board finds Mr. Bodwell's analysis and conclusions are the best evidence on the proportionality of each assessment and support a finding the above abatements should not have been granted by the BOA. In other words, the record does not support the arguments in the BOA's Post-Hearing Memorandum (pp. 11-15) that "good cause" existed or was demonstrated (based on each taxpayer's burden of proof) to justify these abatements. (Cf. RSA 76:16.) With respect to good cause, the board agrees with the analysis and conclusions in the DRA Post Hearing Memorandum (pp. 5-11) that:

> The abatements the [BOA] [m]embers granted themselves and Thomas Rozek were not done in accordance with ordinary and reasonable assessment practices, which is an

> essential ingredient of uniformity and fairness. . . [and] the adjustments made on [those] properties were not based on fair market value.

More specifically, as the DRA further correctly concluded:

> The abatements granted to themselves and Thomas Rozek were not fair or reasonable. In numerous instances the [BOA] made changes in grade, condition, depreciation, and neighborhood codes and factors that were not warranted; they used comparable values from properties that were not comparable, they granted environmental deductions that were not warranted or applied to other similarly situated properties, and unreasonably lowered view factors, all not in conformity with standard assessing practice. . . . [These] improper abatements . . . created disproportionate taxation in the City.

(Id., p. 12.)

Upon review of the record as a whole, and using its judgment and experience,[9] the board finds the BOA members acted improperly in these respects. The board further finds the process followed by the BOA in granting these specific abatements resulted in more than reasonable doubts in the minds of Mr. Dion, as well as Mr. Lauze and perhaps other taxpayers in the City as to whether these abatements were granted in a fair and impartial manner. The DRA argued the facts demonstrate inequity and "self-dealing" on the part of the BOA members. At the very least, the board finds the record as a whole is persuasive of the appearance of impropriety that calls for remedies, as discussed further below.

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[9] See RSA 541-A: 33, VI; and Appeal of City of Nashua, 138 N.H. 261, 264-65 (1994) (the board must employ its statutorily countenanced ability to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it"); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence). The legislature created the board as a tribunal specializing in valuation issues, requiring board members be "learned and experienced in questions of taxation or of real estate valuation and appraisal...." (See RSA 71-B:1.) Further, in making its findings where there is conflicting evidence, the board must determine for itself the credibility of the witnesses and the weight to be given the testimony of each because "judgment is the touchstone." See, e.g., Appeal of Public Serv. Co. of New Hampshire, 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Town of Littleton, 114 N.H. 594, 599 (1974) and Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975).

B. Rulings of Law

1. Jurisdiction

One procedural issue raised by the BOA in its most recent filing and responded to by the DRA is whether the board should "decline to exercise jurisdiction over this matter . . ." because Mr. Dion "did not pay the $65 fee" (referenced in RSA 71-B:16, I). (See BOA Post-Hearing Memorandum, pp. 8-10; cf. DRA Post Hearing Memorandum, pp. 3-5.)[10] Without belaboring the arguments presented, the board agrees with the DRA that jurisdiction is proper under the board's well-established authority.

The BOA and its attorneys are mistaken in emphasizing RSA 71-B:16, I (and the $65 filing fee) as the basis of the board's jurisdiction. In exercising jurisdiction, the board cited RSA 71-B:16, II (the board's "any source" basis for jurisdiction) and RSA 71-B:5, as well as Appeal of Wood Flour, 121 N.H. 991, 994 (1981) ("[t]he board has broad authority to remedy the inequities of improper and illegal taxation" and "the legislature obviously intended the board to scrutinize the legality of abatements as rigorously as it reviews the lawfulness of assessments"). [See page 2 and fn. 2 of October 29, 2019 Order and Hearing Notice; and August 9, 2019 Order, p. 1; see also Tax 103.01(c) (quoted at p. 3 of the DRA Post Hearing Memorandum).]

The board has exercised jurisdiction, when necessary, with respect to other municipalities presenting similar assessment and abatement issues.[11] In brief, and as set forth in the DRA's

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[10] The BOA's Response filed on September 30, 2019, raises the question of whether Mr. Dion paid the filing fee pertaining to RSA 71-B:16, I (see fn. 4, p. 4), but goes on to cite and discuss RSA 71-B:16, II and asks the board to "decline jurisdiction under this statute." (See p. 10; cf. fn. 1 on p. 1.)

[11] See, e.g., In re: Town of Northumberland, BTLA Docket No. 22579-07RA (January 17, 2008); and In re: Town of Andover, BTLA Docket No. 26057-11RA (February 27, 2012).

Post Hearing Memorandum (p. 5) the "BOA's attempt to diminish the [b]oard's authority under RSA 71-B:16, II, is unfounded."

2. Appearance of Impropriety

The BOA argued in its pleadings and at the hearing that its members acted properly because each recused himself or herself while the other two board members reviewed each member's abatement application and the abatement application of the son of one of the members. There is no dispute each member remained in the hearing room while each application was being considered and acted upon by the other two members. [Cf. the virtually identical Affidavits of the three BOA members attached to the BOA Response.] According to the BOA, the steps they took ("process of recusal") "was lawful and removed any appearance of impropriety." (See, e.g., BOA Post-Hearing Memorandum, pp. 19-21 and p. 22, fn. 4.) The board does not agree for a multitude of reasons.

The BOA cites Tax 201.40 (the board's own rule on "Withdrawal or Recusal") and the body of established case law supporting its provisions, including:

> Taylor-Boren v. Isaac, 143 N.H. 261 (1998) ("The test for the appearance of partiality is an objective one, that is, whether an objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case.")

(See BOA Post-Hearing Memorandum, pp. 19-20.[12]) Even if neither the BOA nor the City had a similar or equivalent "rule" in place, the board finds the "objective" standard established in the case law, including Taylor-Boren, applies with equal force, along with common sense, to govern

[12] The BOA Post-Hearing Memorandum, p. 19, also quotes Appeal of Grimm, 141 N.H. 719, 721 (1997), where the supreme court frames the relevant test as follows: are there "facts from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge" (or public official)?

the obvious conflict of issues present when BOA members act upon each other's abatement applications.

The BOA members testified to their understanding that they are "quasi-judicial" officers. Each was appointed to serve as a BOA member by the City Council[13] and each is a public official to the same extent as a selectman under the applicable statutes. (See RSA 48:13.[14]) As public officials, whether compensated or acting as 'volunteers,' the BOA members had important duties and responsibilities to act in the best interest of the City and its residents.

The DRA aptly notes a number of objective appraisal and assessing standards that should have guided the BOA members in their responsibilities, had they made themselves aware of them, instead of the "I was taking care of me" approach expressed by one BOA member in defending her own conduct. See DRA Post Hearing Memorandum, p. 1:

> "[A]n appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests. Uniform Standards of Appraisal Practice, *Ethics Rule*, "Conduct." *See* also Int'l Assoc. of Assessing Officials, *Code of Ethics and Standards of Professional Cond*uct, Canon 1, ER-1 ("It is unethical for members to conduct their professional duties in a manner that could reasonably be expected to create the appearance of impropriety"), Canon 3, ("Members shall not engage in any activities in which they have, or may reasonably be considered by the public as having, a conflict of interest"); N.H. Assessing Standards Board (ASB), *Code of Ethics and Standards of Professional Conduct*, ER 1-1 ("It is unethical for DRA Certified Personnel to conduct their professional duties in a manner that could reasonably be expected to create the appearance of impropriety.")

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[13] The board notes BOA member Eastman is a present member of the City Council, as is Michael Rozek, the husband of BOA member Rozek.

[14] This statute provides:

> The assessors, however elected, shall constitute a board of assessors for the city, who shall perform all the duties relative to taking the inventory and the appraisal of property for taxation, and in regard to the assessment and abatement of taxes and issuing warrants for the collection of the same, as are now or may hereafter be required by law of selectmen and assessors of towns; and shall have all the powers and be subject to the same liabilities, in regard to those duties, which selectmen and assessors in towns now or hereafter may have, or be subject to, in regard to the same.

(Italics in original.) See also Exhibit No. 3, p. 15, where the DRA's Director of Municipal Property Division, James Gerry, notes, quoting the ASB: "Transparency, openness and responsiveness to the public's concerns must be integral to our (assessing community) behavior." Mr. Gerry correctly concludes "the abatements at issue in this matter show a lack of transparency and accountability, of fairness and equity [sic] that we expect of public officials." (Id.)

While there is no question the BOA members had the right to file for abatements of the assessments detailed above, the board finds the process they followed and the resulting outcomes fell short of the standards required by New Hampshire law. This law includes, without limitation, important provisions of the New Hampshire Constitution: see Part First, Article 12; and Part Second, Article 5;[15] see also Appeal of Grimm, 141 N.H. at 720, quoting Part First, Article 35 as follows: "'[i]t is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.' . . . This mandate applies to both trial judges and members of administrative boards acting in a quasi-judicial capacity. [Citation omitted.]"

In addition, there are a number of statutes that could have provided the BOA members and their attorneys the "guidance" they request on how they should have proceeded. RSA ch. 43 is relevant to the issues presented in this proceeding. Specifically, the board notes the following provision:

> **RSA 43:6 Disqualification.** – No selectman or other officer shall act, in the decision of any such case, who would be disqualified to sit as a juror for any cause, except exemption from service, in the trial of a civil action in which any of the parties interested in such case was a party.

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[15] These constitutional provisions mandate, among other things, that each member of the community (including BOA members and other public officials) contribute his or her "share in the expense of government" and that assessments be "proportional and reasonable." See, e.g., Appeals of Bow, Newington and Seabrook, 133 N.H. 194, 199 (1990) ("In order to determine whether [a taxation] scheme is constitutional, we must ask whether it causes disproportionate taxation. [Citation omitted.] A taxpayer is disproportionately taxed if it is assessed at a greater portion of its property's true value than are other taxpayers.")

Under this statutory test, each BOA member would be "disqualified" to sit as a juror in judgment of a cause pertaining to another BOA member. The issue is of such importance that the legislature enacted the following two additional statutes on this issue:

> **43:7 Appointment by Board to Fill Place of Disqualified Officer.** – The place of a selectman or other officer so disqualified shall be supplied by appointment, by the other members of the board, of a qualified person who has theretofore holden [sic] the same office in the town, or, in the case of committees, by a new appointment.
>
> **43:8 Appointment by Court Where Whole Board is Disqualified.** – If in any case the whole board is disqualified the selectmen shall, in writing, so inform some justice of the superior court, who shall thereupon, with or without notice, appoint a new board for that case from qualified persons who have before holden [sic] the same office in the town, if such there be. . . .

These constitutional provisions, statutes, rules and case law authorities amply demonstrate the priorities placed on strict ethical standards on the part of public officials and the avoidance of the appearance of impropriety in their conduct. They support the DRA's arguments that the BOA members "owe[d] a fiduciary duty to the City and its taxpayers not to put their own interests above those of the people they serve. Clapp v. Jaffrey, 97 N.H. 456, 461 (1957); Sherburne v. Portsmouth, 72 N.H. 539 (1904)." (See DRA Post Hearing Memorandum, p. 11.) In the words of Mr. Gerry of the DRA: "At a minimum, [the four abatements granted by the BOA] have the appearance of impropriety which is nearly as corrosive of the public trust as actual impropriety and . . . was completely unavoidable."

In light of these standards, guidelines and principles, the board notes there are a number of things the BOA members could have done, but did not do, to avoid the appearance of impropriety. Several of them have been noted by the DRA. (Id., pp. 12-14.)

First, the BOA members could have referred each of the abatement applications on the four properties discussed above to KRT Appraisal, the City's assessing contractor, for an

analysis and a recommendation, as to whether it should be granted (with a specified abatement amount) or denied. The BOA used KRT Appraisal to inspect other properties where abatement applications were submitted and to "review and make recommendations" with respect to many of them, but did not do so with respect to their own applications or the application of Thomas Rozek. (See, e.g., DRA Exhibit No. 3, pp. 13-14.) The DRA correctly argues this was "unreasonable and smacks of bad faith." (DRA Post Hearing Memorandum, p. 13.) The record confirms "KRT reviewed and made recommendations on 44 abatement applications in the City in 2018 at very modest cost per review." (Id.) In this instance, the BOA members could have taken the extra step, to avoid the appearance of impropriety, of authorizing KRT Appraisal to inspect the four properties and make a recommendation on each abatement application. According to Mr. Goddard's testimony, the BOA members did not believe either KRT Appraisal, their own assessing contractor, or the DRA, the state agency with statutory assessing responsibilities for all municipalities, were "impartial"; the board finds these beliefs have no support in the record.

Second, the BOA members should have cooperated more fully and openly with the DRA and its offer to review their individual abatement applications, including interior as well as exterior inspections of each property. The board is unable to accept their rationale for refusing to do so: there is simply no evidence that the "DRA was not objective." [(Cf. DRA Post Hearing Memorandum, p. 13; see also DRA Exhibit No. 3, pp. 14-15, citing RSA 21-J:10 (Assistance to Municipalities), where Mr. Gerry also details the DRA's offers of assistance to the BOA.]

Third, the BOA members could have asked an independent assessing or appraisal professional or firm to review these abatement requests. Municipalities routinely do so,

especially when independence or particular expertise is needed, and the City has done so in the past to assess various special purpose properties, including those owned by utilities.

For all of these reasons, the board finds remedies are warranted because of the appearance of impropriety standard that must govern conduct of public officials, including the BOA members who have further describe themselves as quasi-judicial officers.[16]

3. 2020 Statistical Update

Although the hearing focused primarily on the above tax year 2018 abatements granted by the BOA members, the parties also presented facts and arguments pertaining to the tax year 2020 statistical update performed by Corcoran Consulting Associates, Inc. The record presented indicates the DRA has reviewed the "2020 USPAP Report" prepared by Corcoran Consulting Associates pursuant to the DRA's authority under RSA 21-J:14-b, I(c) and noted some issues still in need of resolution. (See February 12, 2021 letter with "USPAP Compliance Checklist" attached to DRA Post Hearing Memorandum; and the DRA Letter referenced in fn. 4.)

4. Remedies

Based upon the above findings and rulings, the board finds the following four discrete remedies are warranted.

First, the board agrees with the DRA (see Post Hearing Memorandum, p. 16) that "pay back" to the City is required of "the improper reduction of taxes" in 2018 and 2019 resulting from the abatements granted by the three BOA members to themselves and the son of one member (Thomas Rozek). These four taxpayers are ordered to pay to the City the respective

[16] Contrary to the arguments in the BOA Post-Hearing Memorandum (pp. 22-25), a finding based on this standard does not require proof (by a preponderance of the evidence) of direct collusion or fraud by the BOA members or even "self-dealing" or "bad faith" for that matter. Proper conduct by public officials, including BOA members, requires a uniform and consistent standard of conduct substantially higher than that.

reductions in taxes resulting from their abated assessments for tax year 2018 and 2019 (the last year prior to the tax year 2020 update of values). In other words, for these tax years the 2018 assessed values, as determined by KRT Appraisal and shown in the chart above, should be applied without any BOA abatements. In addition, for the Goddard property for tax year 2019 an additional of amount of pay back is required to take into account the higher percent of completion (and consequently higher assessed value) as of the April 1, 2019 assessment date.[17] The City is ordered to take all steps necessary to insure: (1) the corrected assessments and taxes owed, including interest from the dates of the abatements, are calculated and invoiced to each taxpayer; and (2) the invoiced amounts are collected. (See ch. 80.) The board expects these steps to be completed within sixty (60) days of the Clerk's date shown below; and the City shall notify the board and the other parties in writing as to its compliance with this aspect of the Order.[18]

Second, the board in its deliberations examined the BOA minutes with respect to 35 properties listed in Table 2 where the BOA members made adjustments and granted abatements without any input from KRT Appraisal. The board finds these abated assessments were not arrived at using market value evidence and likely created additional assessing inequities and inconsistencies. The BOA abatements were arrived at by making ad hoc and unsupported adjustments (to neighborhood codes and site indexes, for example) rather than by employing consistent factors and standards. Due to cost and efficiency considerations, and in lieu of ordering another revaluation, the board orders the City's contracted assessor for tax year 2021 to

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[17] In tax year 2018, the Goddard property was assessed with a "25% Complete" adjustment. (See DRA Exhibit No. 15, p. 94.) The percentage of completion was certainly higher for tax year 2019.

[18] Cf. In re: Town of Seabrook, BTLA Docket No. 26624-12OS (February 6, 2013 Decision and May 23, 2013 Order).

review and reassess these 35 properties in conformance with the objective and uniform standards set forth in the current reassessment manual. In addition, the City's contracted assessor should review and reassess the Deane Property identified in fn. 8. The City is ordered to notify the board in writing when this task for tax year 2021 has been performed and provide supporting documentation.

Third, and notwithstanding the BOA's arguments to the contrary (cf., BOA Response, p. 4), the board finds the work on the tax year 2020 update yet to be completed also warrants keeping this docket open. The reasons for doing so stated in the DRA Post Hearing Memorandum, p. 15, are persuasive and have not been seriously challenged by the City whose attorney states he is "leav[ing] that decision to the board's discretion." (See the City's Response referenced in fn. 4.) When a revaluation or update is performed, the USPAP manual must be satisfactorily completed and approved by the DRA.[19] Consequently, the board will not decide whether to close this docket until the DRA confirms in writing that all of the outstanding issues noted with respect to the tax year 2020 update have been resolved.

Finally, the board finds the BOA members have an obligation to improve their knowledge of assessing and appraisal standards, especially in light of the problems noted above. They can do so, by among other things, participating in various educational courses, including the DRA "State Statutes Course" when it is next offered. Additional training and sensitivity, in light of the issues presented in this docket, would be of great benefit to the taxpayers of the City.

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[19] "The documentation included in a reassessment manual and on the accompanying assessment-record cards ("ARCs") are part and parcel of a satisfactorily completed reassessment. Providing such documentation to enable taxpayers and others to understand the process and values determined in a reassessment is a necessity, not just a technicality. Thus, the compilation of a complete and understandable manual is a substantive and important matter, not simply a superfluous exercise or an afterthought." See In re: Town of Bartlett, BTLA Docket No. 25429-10RA (December 20, 2012 Order), p. 4.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Anne M. Stelmach, Clerk
Per Order of the Board

Certification

I hereby certify a copy of the foregoing Order has been mailed this date, postage prepaid, to: Charles P. Bauer, Esq. and Matthew V. Burrows, Esq., Gallagher, Callahan & Gartrell, 214 N. Main Street, Concord, NH 03301; Christopher T. Hilson, Esq., Donahue, Tucker & Ciandella, PLLC, 16 Acadia Lane, PO Box 630, Exeter, NH 03833; Christopher L. Boldt, Esq., Donahue, Tucker & Ciandella, PLLC, 164 NH Rte. 25, Towle House – Unit 2, Meredith, NH 03253, counsel for the Municipality; Peter C.L. Roth, Esq. and Derek E. Kline, Esq., State of New Hampshire, Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301, counsel for Department of Revenue Administration; Mr. James Gerry, Director of Property Appraisal, State of New Hampshire, Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301, Intervenor; Chairman, Board of Assessors, 168 Main Street, Berlin, NH 03570; Mr. James Wheeler, City Manager, City of Berlin, 168 Main Street, Berlin, NH 03570; KRT Appraisal, 191 Merrimack Street - Suite 701, Haverhill, MA 01830, Contracted Assessing Firm; and Mr. Stephen M. Dion, 100 Jasper Street, Berlin, NH 03570, Courtesy Copy.

Dated: March 17, 2021

Anne M. Stelmach, Clerk

Table 1

DATE OF HEARING: January 12, 2021 **TIME: 9:00 a.m.**
LOCATION: REMOTE

FOR THE CITY COUNCIL	**Title: (association/relationship)**
Jim Wheeler	City Manager
Christopher Boldt, Esq.	Attorney
Peter Higbee	City Councilor

FOR THE BOARD OF ASSESSORS	**Title: (association/relationship)**
Charles Bauer, Esq.	Attorney
Matthew Burrows, Esq.	Attorney
Robert Goddard, Chair	Board of Assessors
Mark Eastman, Member	Board of Assessors
Kem Rozek, Member	Board of Assessors

FOR THE DRA	**Title: (association/relationship)**
Derek Kline Esq.	Attorney
Peter Roth, Esq.	Attorney
James Gerry	Director of Municipal & Property
Samuel Greene	Administrator, Municipal & Property
Phil Bodwell	District Supervisor
Ben Lafond	
Jason Bickford	
Vicki Ayer	
Lisa Mudge	
Adam Denocour	

FOR THE PETITIONER

Steven Dion

OTHERS ATTENDING HEARING (Observers, etc.)

Monica Hurley	Assessor
Lise Barrette	City Assessing Clerk
Barbara Tetreault	Berlin Daily Sun
Jason Call	Northtown Associates
Marc Lauze	Taxpayer

DATE OF HEARING: February 4, 2021 **TIME: 9:00 a.m.**
LOCATION: REMOTE

FOR THE CITY COUNCIL	**Title: (association/relationship)**
Jim Wheeler	City Manager
Christopher Boldt, Esq.	Attorney

FOR THE BOARD OF ASSESSORS	**Title: (association/relationship)**
Charles Bauer, Esq.	Attorney
Matthew Burrows, Esq.	Attorney
Robert Goddard, Chair	Board of Assessors
Mark Eastman, Member	Board of Assessors
Kem Rozek, Member	Board of Assessors

FOR THE DRA	**Title: (association/relationship)**
Derek Kline Esq.	Attorney
Peter Roth, Esq.	Attorney
James Gerry	Director of Municipal & Property
Phil Bodwell	District Supervisor
Ian Rossi	Legal Intern
Lisa Mudge	

FOR THE PETITIONER

Steven Dion

OTHERS ATTENDING HEARING (Observers, etc.)

Monica Hurley	Assessor
Lise Barrette	City Assessing Clerk
Barbara Tetreault	Berlin Daily Sun
Jason Call	Northtown Associates
Rob Tozier	KRT Appraisal
Dave Woodward	Avitar Associates

Table 2

Tax Year 2018 Abatements Granted by BOA Without KRT Input:

Map/Lot	Address	Taxpayer	BOA Minutes -- see DRA:
120/425	Cedar Street	Horan	Exhibit 7
122/19	14 Grandview Drive	Gardner	Exhibit 7
113/4	4 Nibroc Street	Goulet	Exhibit 7
404/23	2240 Riverside Drive	Aristegni	Exhibits 8 & 11
130/13	612 Rockingham Street	Blair	Exhibit 8
130/14	606 Rockingham Street	Blair	Exhibit 8
138/13	255 Howard Street	Nicoletti	Exhibit 8
126/08	Norway Street	Charest	Exhibit 8
126/114	Nansen Street	Charest	Exhibit 8
127/111	205 Finland Street	Deibel	Exhibit 9
130/307	565 Burgess Street	Couture	Exhibit 9
138/28	2525 Howard Street	Rozek	Exhibit 9
139/1	1 Lovett Street	Rozek	Exhibit 9
132/45	630 Trudel Street	Croteau	Exhibit 10
131/25	288 Hillsboro Street	Theberge	Exhibit 10
131/28	Hillsboro Street	Theberge	Exhibit 10
131/29	Hillsboro Street	Theberge	Exhibit 10
119/219	213 School Street	Eastman	Exhibit 10
135/3	27 Horne Street	Murray	Exhibit 10
125/31	473 Grafton Street	Warner	Exhibit 11
132/58	660 Blais Street	Giulbeault	Exhibit 11
132/50	Trudel Street	Giulbeault	Exhibit 11
119/391	110 Jolbert Street	Lamontagne	Exhibit 11
133/52	822 Kent Street	Delafontaine	Exhibit 11
132/44	638 Trudel Street	Harvey	Exhibit 11
130/273	348 Burgess Street	Kimber	Exhibit 11
127/110	189 Finland Street	Kimber	Exhibit 11
137/65	1862 Riverside Drive	Lauze	Exhibit 11
404/12	2231 Riverside Drive	Bailey	Exhibit 11
403/28	24 Tamarack Lane	Morin	Exhibit 11
126/70	26 Goddard Hill Road	Goddard	Exhibit 11
120/111	147 State Street	Savard	Exhibit 13
125/66	11 Dustin Street	Albert	Exhibit 13
132/100	460 Grafton Street	Boucher	Exhibit 13
122/11	3 Grandview Drive	Deane	Exhibit 13